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CITATIONS

558-299—74——1

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-822

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A) is reported at 487 F. 2d 936.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1973. The petition for a writ of certiorari was filed on November 24, 1973, and was granted on February 19, 1974. On June 24, 1974, the Court deferred consideration of the government's motion to dismiss the writ of certiorari to the hearing of the case on the merits.. The jurisdiction of this Court rests upon Section 211(g) of the Economic

Stabilization Act of 1970, as amended,[1] and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 3, of the United States Constitution provides in part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

Article VI, clause 2, of the United States Constitution provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Relevant provisions of the Economic Stabilization Act of 1970 are set forth in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether the writ of certiorari should be dismissed because the question presented no longer is of continuing importance.

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[1] 85 Stat. 750, 12 U.S.C. 1904 (Supp. II).

2. Whether wage controls promulgated under the Economic Stabilization Act of 1970 may constitutionally be applied to the employees of state governments.

STATEMENT

The Economic Stabilization Act was originally signed into law in August, 1970[2] and was then extended five times[3] before expiring on April 30, 1974. Section 203 of the Act[4] authorized the President to issue orders and regulations to stabilize, among other things, wages and salaries at levels not less than those prevailing on May 25, 1970.

The Act was implemented on August 15, 1971, when the President issued Executive Order 11615[5] imposing a 90-day freeze, commonly referred to as "Phase I," upon prices, wages, rents and salaries. The Cost of Living Council ("Council") was established on this date to administer and implement the provisions of Executive Order 11615.

The President issued Executive Order 11627[6] on October 15, 1971, in order to provide for an orderly transition from Phase I to a program of mandatory economic controls which was commonly referred to as "Phase II." The Council was continued by Executive Order 11627 to oversee the economic stabilization program and the President established the Pay Board to perform such functions with respect to the stabi-

[2] 84 Stat. 799.

[3] 84 Stat. 1468; 85 Stat. 13; 85 Stat. 38; 85 Stat. 743; 87 Stat. 27.

[4] 85 Stat. 744.

[5] 36 Fed. Reg. 15727.

[6] 36 Fed. Reg. 20139.

lization of wages and salaries as the Council might delegate.

Acting pursuant to the authority delegated by the Executive Orders, the Council issued a regulation which provided that any pay adjustments affecting more than 5,000 employees required Pay Board approval prior to implementation.[7] The Pay Board also issued a regulation which limited annual wage and salary increases to 5.5 percent [8] for all persons subject to the regulation. From the inception of the economic stabilization program, the Council [9] and the Pay Board [10] interpreted the Act to include employees of state and local governmental units.

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147 ("Bill 147") (App. 1).[11] Bill 147 provided a 10.6 percent wage and salary increase, effective January 1, 1972, for approximately 65,000 state employees (App. 1).

Ohio filed a request with the Pay Board for an exception to the general wage and salary limit of 5.5 percent to pay the increases provided by Bill 147 (App. 3). After a public hearing and Ohio's submission of further oral and written statements, the Pay Board on March 10, 1972 permitted Ohio to pay only 7 percent instead of the 10.6 percent increase

[7] 6 C.F.R. 101.21 (36 Fed. Reg. 21788, November 13, 1971). See also 6 C.F.R. 101.28 (37 Fed. Reg. 1240, January 27, 1972).

[8] 6 C.F.R. 201.10 (36 Fed. Reg. 21791, November 13, 1971).

[9] 6 C.F.R. 101.51 (36 Fed. Reg. 21790, November 13, 1971); 6 C.F.R. 101.28 (37 Fed. Reg. 1240, January 27, 1972).

[10] 6 C.F.R. 201.3 (36 Fed. Reg. 25428, December 31, 1971).

[11] Ohio Revised Code, § 143.10(A), as amended § 124.15(A).

provided by Bill 147 (App. 3, 22–24).[12] The Pay Board subsequently denied reconsideration (App. 3).

In litigation brought in the Ohio courts seeking writs of mandamus to compel Ohio officials to pay the full increases provided by Bill 147, the Ohio Supreme Court ordered such relief (App. 2, 42; *Fry* v. *Ferguson,* 34 Ohio St. 2d 252, 298 N.E. 2d 129).

The United States filed this action in the United States District Court for the Southern District of Ohio to enjoin Ohio and its officials from paying wages and salaries in excess of those authorized by the Pay Board (App. 4). The district court certified a constitutional question, essentially that presented here, to the court of appeals pursuant to Section 211(c) of the Act.[13]

The court of appeals held that the Act applied to state and local government employees, and further held, relying on *Maryland* v. *Wirtz,* 392 U.S. 183, that the application of the Act was constitutional. Accordingly, the court of appeals enjoined the State of Ohio

[12] The Pay Board found, for the purpose of determining when a wage adjustment could be implemented under the applicable regulations, that the appropriate wage year for the employees involved was from November 14, 1971 through November 13, 1972 (App. 23–24). The Pay Board permitted the full increase which was requested by Ohio, 10.6 percent, to be implemented from March 17, 1972 to November 13, 1972. This action was taken when the Pay Board determined that payment at a rate of 10.6 percent from March 13 through November 13, 1972 was equal to payment at a rate of 7 percent from November 14, 1971 through November 13, 1972. The issue here, therefore, affects only wages and salaries for the period from January 1, 1972 through March 16, 1972.

[13] 85 Stat. 749.

and its officers from paying wage and salary increases in excess of those authorized by the Pay Board."

SUMMARY OF ARGUMENT

I

After certiorari was granted in this case on February 19, 1974, the Economic Stabilization Act of 1970, as amended, expired on April 30, 1974. As more fully explained below (pp. 7–10, *infra*), the constitutional question presented here thus has no substantial continuing importance. The writ of certiorari should therefore be dismissed.

II

Three of the *amici* contend that the Economic Stabilization Act of 1970 cannot be interpreted to apply to the states. This question was not presented in the petition for a writ of certiorari, and under the Rules of this Court and settled practice, the Court should not consider the issue. In any event, both the language and legislative history of the Act show that Congress intended that the Act apply to wages and salaries of state employees.

III

This Court has repeatedly held, most recently in *Maryland* v. *Wirtz,* 392 U.S. 183, that the Commerce Clause permits the application of federal regulation

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" Petitioners Fry and Boehm are employees of the State of Ohio who intervened in this action in the district court. The State of Ohio was a party to this action in the proceedings below and its petition for a writ of certiorari, No. 73–839, is pending.

to state activity. The Economic Stabilization Act of 1970 was a valid exercise of the commerce power. The Act was designed to deal with serious national economic ills caused in part by incresed wages and salaries. Since wages and salaries of state employees are indistinguishable from those of the private sector in their impact on the economy, Congress rationally concluded that the Act should apply to the wages and salaries of state employees.

The sovereignty of the states was not undermined or eroded by the Act. The Act merely imposed a maximum limitation on wages and salaries; it did not affect the manner in which state governmental functions were performed.

The Ohio statute in question, as interpreted by the Ohio Supreme Court, conflicts with the Economic Stabilization Act of 1970, as amended. If the Ohio statute were permitted to supersede the federal statute, the objectives of Congress would be frustrated. Therefore, the Supremacy Clause precludes enforcement of the Ohio statute, as construed by the Ohio Supreme Court.

ARGUMENT

I

THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE QUESTION PRESENTED HAS NO CONTINUING IMPORTANCE

The petition for certiorari was granted in this case on February 19, 1974, to consider whether wage controls promulgated under the Act may constitutionally be applied to the employees of state governments. The

authority delegated by Congress to the President to implement such controls expired on April 30, 1974.[15] On May 24, 1974, the government filed a motion to dismiss the writ of certiorari. The motion argues that the issue presented by this case has no prospective importance since the Act has expired. On June 24, 1974, the Court deferred consideration of the government's motion to the hearing of the case on the merits.

In their memoranda in opposition to the motion to dismiss, the parties and the *amici* made three arguments why the Court should decide this case: (1) Congress may enact similar legislation; (2) there are other pending cases presenting the issue; (3) the authority of Congress to control the wages and salaries of state employees is an important constitutional issue which this Court should decide. None of these arguments, individually or collectively, refutes the points made in our motion to dismiss.

1. Although Congress recently authorized the President to establish a Council on Wage and Price Stability, that agency was given authority only to monitor salaries and wages, not to limit them. P.L. 93–387, 88 Stat. 750. The Council on Wage and Price Stability does not have the authority of the agency whose validity is challenged in this case.

2. In our motion to dismiss we cited three other cases presenting the same issue (p. 2, n. 2). One of those cases has since been decided without reaching the constitutional issue.[16] The two other cases are still

[15] 87 Stat. 29.

[16] The Temporary Emergency Court of Appeals disposed of *County of Nassau, New York* v. *Cost of Living Council* (No. 2–19, decided June 27, 1974) without deciding the constitutional issue.

pending.[17] While those two cases are important to the parties to them, their pendency itself does not establish that the issue is of continuing national importance.

3. Although the constitutional issue may be abstractly important, there is no occasion for this Court to resolve it where the underlying statute whose constitutionality is challenged is no longer in effect and there are only two other pending cases involving the issue. If the Act has terminated before the Court had acted upon the petition for certiorari, the Court undoubtedly would have denied review because the issue no longer was of continuing importance.[18] The same situation now exists in this case because of the termination of the Act after certiorari was granted, and it calls for the same result, to be accomplished by dismissing the petition. "Considerations of propriety, as well as long-established practice, demand

[17] *United States* v. *Missouri* (W.D. Mo.), Civil No. 1888, is pending in the district court. *United States* v. *California* is now on appeal to the Temporary Emergency Court of Appeals from a preliminary injunction that the district court had granted against the State of California and its officials. The United States brought that case after the California Supreme Court ruled in *Cohn* v. *California*, 113 Cal. Rptr. 187, 520 P. 2d 1003, on April 19, 1974, that a peremptory writ compelling state officials to pay the full amount of an 11.5 percent wage and salary increase pursuant to a state legislative enactment should issue notwithstanding a Cost of Living Council order authorizing payment of only 7 percent.

[18] The Court often has denied certiorari despite a conflict on an issue of statutory interpretation, where the statute has expired or has been amended "in a manner which will prevent the problem from arising in the future." Stern & Gressman, *Supreme Court Practice* (4th ed.), p. 156.

that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function * * *" (*Blair* v. *United States*, 250 U.S. 273, 279).

II

THE ECONOMIC STABILIZATION ACT OF 1970 APPLIED TO WAGES AND SALARIES PAID TO STATE EMPLOYEES

Three of the *amici*,[19] but not the petitioners, argue that as a matter of statutory interpretation, the Act does not apply to the states. This argument is not properly before the Court, and in any event is unsound.

1. The only question presented in the petition (Pet. 1) is whether Congress, under its commerce power, constitutionally may apply economic controls to the wages and salaries of state employees. Under the Rules of this Court (Rules 23(1)(c) and 40(1)(d)(2)) and its settled practice (see, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428–429), the Court would not consider the statutory contention if petitioners had now raised it. The reason for that rule—to insure that the Court is fully apprised of the issues it would have to resolve in deciding whether to grant the petition—is no less, and probably is more, applicable when the additional issues are sought to be injected into the case at the merits stage not by the petitioners them-

[19] *Missouri* (Br. 5–9), *California* (Br. 6–11) and *California State Employees' Association* (Br. 16–20).

selves but by *amici*. The Court therefore should decline to consider the statutory issue.[20]

2. The language and the legislative history of the Act show that it covers the wages and salaries of state employees.

As originally enacted in the summer of 1970 (84 Stat. 799), the statute merely gave the President general authority to "issue such orders and regulations as he * * * deem[ed] appropriate to stabilize * * * wages, and salaries at levels not less than those prevailing on May 25, 1970" (Section 202, 84 Stat. 799).[21] On August 15, 1971, the President, by Executive Order (No. 11615, 36 Fed. Reg. 15727), imposed general economic controls in the form of a 90-day freeze upon prices, rents, wages and salaries. At the same time, he established the Cost of Living Council to carry out the freeze (36 Fed. Reg. 15728).

On October 15, 1971, the President, by Executive Order (No. 11627, 36 Fed. Reg. 20139), established a broader program of general economic controls. He continued the Council, and also established the Pay Board to "perform such functions with respect to the stabilization of wages and salaries" as the Council would delegate to it (36 Fed. Reg. 20142).

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[20] For the same reason, the additional constitutional issue that the *amicus* California State Employees' Association raises (Br. 21–23)—that the delegation of authority from Congress to the President in Section 203 of the Act is unconstitutional under Article 1, Section 1 of the Constitution—is not properly before the Court.

[21] This authority originally expired on February 28, 1971, but was extended to April 30, 1972. 84 Stat. 1468; 85 Stat. 13; 85 Stat. 38.

In December 1971, Congress made extensive amendments to the Act, which the President signed on December 22, 1971 (85 Stat. 743). In these amendments Congress made the following finding (Section 202, 85 Stat. 744):

> It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize * * * wages [and] salaries * * *.

Congress also authorized the President

> to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—
>
> (1) stabilize * * * wages, and salaries at levels not less than those prevailing on May 25, 1970 * * *.

Section 203(b)(5) of the amendments provided that the standards to be adopted governing acceptable levels of wages and salaries were to "call for generally comparable sacrifices by business and labor as well as other segments of the economy."

Acting pursuant to authority which the President delegated to the Council and the latter in turn then subdelegated to it, the Pay Board, on December 31, 1971, issued detailed regulations providing for the stabilization of wages and salaries. 6 C.F.R. § 201, *et seq.* The regulations defined "[p]erson" to include "any * * * State or local governmental unit or instrumentality of such governmental unit."

It was pursuant to these regulations that the Pay Board disapproved the portion of the Ohio State employees' wage and salary increases involved in this litigation.

The congressional findings in the Act recognized "necessary" ~~appropriate~~ * * * to * * * stabilize * * * wages, and salaries." The broad grant of authority to the President to "issue such orders and regulations as he deems appropriate * * * to * * * stabilize * * * wages and salaries" covers all wages and salaries. It contains no exception for wages and salaries of state employees, even though Congress did prohibit stabilization of wages and salaries of certain categories of employees, such as those whose earnings were substandard or who were members of the working poor (Section 203(d)) or where wage increases were required under the Fair Labor Standards Act of 1938 (Section 203(f)(1)).[22]

Indeed, Congress contemplated that, in order to accomplish stabilization of wages and prices, sacrifices would be required not only by business and labor but also by "other segments of the economy" (Section 203(b)(5)). As we show below, the congressional purpose of placing a significant brake on inflation would have been seriously impeded if a substantial number of state employees were excepted from the wage and salary controls imposed.

The fact that the Amendments did not specifically refer to "states" in authorizing the President to

[22] Other exemptions from the Act are set forth in Sections 203 (c)(1)-(3), (f) (2)-(3), and (g) of the Act.

stabilize wages and salaries does not justify the inference that Congress did not intend to permit him to impose controls upon that important segment of the economy. This Court rejected a similar contention in *Case* v. *Bowles,* 327 U.S. 92, where it was argued that the Emergency Price Control Act of 1942 was inapplicable to the states. The Court stated (p. 99):

> The argument that the Act should not be construed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word "state," courts should not construe regulatory enactments as applicable to the States. This Court has previously rejected similar arguments, and we cannot accept such an argument now. [Footnote omitted] [23]

One of the cases the Court cited for the latter proposition was *United States* v. *California,* 297 U.S. 175. There, in rejecting the contention that the federal

[23] Although the statute involved in *Bowles* applied to the "United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing" (see 327 U.S. at 99), the Court's statement quoted in the text did not rely upon that fact but rather focused on the claim that the failure of Congress to use the word "state" warranted the inference that Congress did not intend the legislation to apply to states. Indeed, the cases that the Court cited in which it had "previously rejected similar arguments" did not include this language. 327 U.S. at 99, n. 5.

Safety Appliance Act did not apply to the State of California, the Court refused to extend the "canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it * * * so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action" (297 U.S. at 186).

Any possible doubt whether the 1971 amendments were intended to cover wages and salaries of state employees is dispelled by the legislative history of those amendments. The Senate Committee stated that one of the questions it considered was whether "the Committee should exempt from the Act" certain firms and wage contracts, and that among the "[s]pecific exemptions" which it considered was:

> Pay adjustments which apply to or affect employees of State or local governments [S. Rep. No. 92–507, 92d Cong., 1st Sess., 1971, p. 4].

The Committee concluded that the "granting of broad exemptions from the legislation could make it impossible to meet" the statutory criteria, and "[t]he Committee, therefore, did not exempt these specific segments of the economy from the Act" (*ibid.*).

The fact that the Committee formulated the question in terms of whether it should "exempt" from the Act various wage and salary increases indicates a recognition that, without such "[s]pecific exemptions," the broad language of the Act as drafted would cover the various specific categories for whom exemptions were considered, including "employees of State or local governments."

In considering the bill, the Senate voted down an amendment that would have made the Act inapplicable to state employees. 117 Cong. Rec. 43673–43677.[24] That amendment similarly implicitly recognized that without it the Act would apply to such employees.

III

THE APPLICATION OF THE ECONOMIC STABILIZATION ACT OF 1970 TO WAGES AND SALARIES OF STATE EMPLOYEES DOES NOT VIOLATE THE TENTH AMENDMENT

Relying upon the dissenting opinion in *Maryland* v. *Wirtz, supra,* 392 U.S. at 201, petitioners contend that application of the Economic Stabilization Act of 1970 to the wages and salaries of state employees would violate the Tenth Amendment because such application would permit the federal government to "devour the essentials of State sovereignty" (Pet. Br. p. 5). We submit that the majority opinion in that case, however, supports the constitutionality of that application of the statute; that prior decisions of this Court also establish the validity of this exercise of Congressional power over interstate commerce; and that petitoners' argument rests upon an erroneous assumption about the impact of the statute upon the exercise of state governmental functions.

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[24] This amendment provided (117 Cong. Rec. 43673): "The authority conferred on the President by this section shall not be exercised after April 30, 1972, to limit the level of any pay adjustment which applies to or affects employees of a State or local government or agency thereof, unless the President determines the amount of such pay adjustment is unreasonably inconsistent with the standards published under subsection (b)."

1. In *Maryland* v. *Wirtz*, *supra*, this Court upheld, as against contentions similar to those petitioners here make, the application of the Fair Labor Standards Act to schools and hospitals operated by the states or their subdivisions. It pointed out that "labor conditions in schools and hospitals can affect commerce" (p. 194); that Congress had "interfered with" the states' performance of "medical and educational functions * * * only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals" (pp. 193–194); that there was a "rational basis" for "congressional action prescribing minimum labor standards for schools and hospitals" (p. 195); and that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved" (pp. 196–197). The Court stated that "it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the State for the benefit of their citizens" (pp. 198–199).

Although there are differences between *Maryland* v. *Wirtz* and this case, the principles and reasoning of *Maryland* are equally applicable here. They establish that the Economic Stabilization Act of 1970 may constitutionally be applied to state employees.

2. This Court has repeatedly recognized the broad sweep of the power that Congress has over commerce.

In the landmark decision of *Gibbons* v. *Ogden,* 9 Wheat. 1, 196, the Court stated that the commerce power

> is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

See, also, *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 255, where the Court quoted with approval this description of the commerce power.

In *North American Co.* v. *Securities & Exchange Commission,* 327 U.S. 686, in upholding the constitutionality of certain provisions of the Public Utility Holding Company Act, this Court indicated the breadth of the commerce power (327 U.S. at 705):

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States,* 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

Congress enacted the Economic Stablization Act to deal with serious national problems that resulted from major inflationary pressures in the economy. In Sec-

tion 202 of the Act, Congress stated that the legislative goals were to: (1) stabilize the economy; (2) reduce inflation; (3) minimize unemployment; (4) improve the Nation's competition in world trade; (5) protect the purchasing power of the dollar.

The Act sought to deal with economic problems that were nation-wide in scope and had a direct adverse impact on interstate commerce. Unemployment had risen from 3.5 percent in 1969 to 5.9 percent in 1971. *Economic Report of the President,* February, 1974, 279. The consumer price index had increased approximately 25 percent in six years, going from 94.5 in 1965 to 121.3 in 1971. *Id.* at 300. The effects of these economic difficulties were not limited to the domestic economy. The increasing costs of American goods and services made such goods and services less competitive with foreign goods and services in both domestic and foreign markets, and resulted in a dramatic change in the nation's balance of payments in foreign trade. This balance changed from a $2.7 million surplus in 1969 to a $29.7 million deficit in 1971 on a reserve transaction basis. *Id.* at 351.

Congress, recognizing that increases in wages and salaries necessarily affect the costs of goods and services, determined that such increases were part of a wage-cost-price spiral which was a major cause of the nation's economic ills. See H. Rep. No. 91–1330, 91st Cong., 2d Sess., 9–11 (1970). Congress did not abuse its discretion in concluding that wages and prices should be stabilized to deal with the nation's economic difficulties. That conclusion was amply supported by

evidence and testimony adduced in congressional hearings.[25]

Control of wages and prices thus was an appropriate exercise by Congress of the commerce power.

3. While not disputing Congress' power to regulate wages and salaries in the private sector, the *amici* argue that there was no rational basis for extending that regulation to state employees. Wages and salaries paid to employees of state and local governments, however, have a substantial impact on interstate commerce. In 1971 state and local government employment accounted for 14 percent of the national labor force (*Economic Report of the President,* February, 1974, 282), and wages and salaries paid on account of such employment amounted to $73.2 billion. Survey of Current Business, U.S. Department of Commerce, August, 1972.

As discussed above, in *Maryland* v. *Wirtz, supra,* this Court recognized that, under the commerce power, Congress may regulate the wages and salaries of state employees where there is the requisite effect on interstate commerce. The *amici* seek to distinguish *Maryland* v. *Wirtz* on the ground that there the state enterprises held subject to federal regulation involved "proprietary" rather than "governmental" activity. But this Court has expressly rejected that distinction when Congress acts, as here, under the Commerce

[25] See, *e.g.*, H. Rep. No. 91-1330, 91st Cong., 2d Sess. 9-11; See also, Hearings before the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 1st Sess., November 1-5, 1971, Testimony of Arthur Burns, Chairman, Federal Reserve Board, pp. 95-97.

Clause. In *United States* v. *California*, 297 U.S. 175, in upholding the application of the federal Safety Appliance Act to a wholly intrastate non-profit railroad operated by a state to facilitate transportation at a port, the Court stated (pp. 183–185):

> * * * [I]t [is] unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. * * *
>
> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

4. The wages and salaries paid by the states have the same substantial impact upon the economy as the wages and salaries paid by private employers. This fact was recognized in analogous circumstances in *Case* v. *Bowles*, 327 U.S. 92, 100, where this Court upheld the application of the Emergency Price Control Act of 1942 to the State of Washington:

> Excessive prices for rents or commodities charged by a State or its agencies would produce exactly the same conditions as would be produced were these prices charged by other persons.

Congress rationally concluded that it was essential to both the achievement of fairness and the implementation of the Act's objectives that the Act cover state employees. See, *e.g.*, S. Rep. No. 92–507, 92d Cong., 1st Sess., 4; 117 Cong. Rec. 43673–43677. State

and private employees were treated identically under the Act. Indeed, if state employees were not subject to the limitations upon increases in wages and salaries which covered the majority of this country's employees who were in private employment, the result inevitably would have been to weaken and make it more difficult to enforce the controls in the private sector.

The situation in the present case is thus analogous to *Wickard* v. *Filburn*, 317 U.S. 111, where the Court upheld, as a valid exercise of the commerce power, the application of the Agricultural Adjustment Act to wheat that would be consumed on the farm and thus would never enter the stream of commerce. The Court pointed out that even though the growing of wheat for consumption on the farm "be local and though it may not be regarded as commerce, it still may, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (p. 125). It stated (p. 128) that "One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market"; that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions"; and that even wheat that is "never marketed * * * supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." The Court concluded (pp. 128–129):

> Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would

> have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

The Court recently twice reaffirmed this ruling. *United States* v. *Haley*, 358 U.S. 644; *United States* v. *Ohio*, 385, U.S. 9.[26]

Similarly, Congress properly concluded that to exclude state employees from the coverage of the Economic Stabilization Act would "have a substantial effect in defeating and obstructing its purpose" to control inflation in the national economy.

"[*United States* v.] *Darby* [p. 24, *infra*] itself recognized the power of Congress * * * to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is 'within the reach of the federal power'" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 192, footnotes omitted). In the Economic Stabilization Act of 1970, Congress declared that "an entire class of activities"—the setting of wages and salaries—"affects commerce." As shown, Congress had a "rational basis" for that determination, and the Act constituted a valid "regulation * * * of commerce among the States" (*Maryland*, *supra*, 392 U.S. at 198).

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[26] In *Haley*, the district court held that Congress acted beyond its constitutional power in regulating production of wheat used as feed on a farm. 166 F. Supp. 336 (N.D. Tex.). In *Ohio*, the Court of Appeals for the Sixth Circuit held that production of wheat on farms owned by the state, which was intended entirely for consumption by state institutions, had an insufficient impact on interstate commerce to bring it within the coverage of the Agricultural Adjustment Act. 354 F. 2d 549. In both cases, this Court summarily reversed, on the authority of *Wickard* v. *Filburn*.

5. This conclusion is dispositive of petitioners' Tenth Amendment claim. The only limitation that amendment imposes upon the federal commerce power is that the particular exercise be rationally related to that power. As this Court stated in *United States* v. *Darby*, 312 U.S. 100, 124, the Tenth Amendment:

> * * * states but a truism that all is retained which has not been surrendered. * * *
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. * * *

See, also, *Maryland* v. *Wirtz, supra,* 392 U.S. at 195–196.

6. Petitioners' argument rests upon a misapprehension of the effect of the Act upon the states' performance of their sovereign functions. Neither Congress, the Council nor the Pay Board in any way attempted to control or influence the manner in which the state governments operated or functioned. The Act merely imposed upon state employees the same limitation on wage and salary increases to which all other employees were generally subject. Cf. *Maryland* v. *Wirtz,* supra, 392 U.S. at 193–194.

Indeed, this Act had a lesser impact upon the performance of state functions than the Fair Labor Standards Act involved in *Maryland* v. *Wirtz, supra.* Unlike the latter Act, this Act did not require the states to increase revenues or reallocate resources. Moreover, while the Fair Labor Standards Act was permanent legislation, the Economic Stabilization Act

was a temporary measure designed to provide interim relief for a major national economic problem.

7. Since the Ohio statute, as construed by the Ohio Supreme Court, requires the State to pay the full wage and salary increases the statute provides (*supra*, p. 5), it is invalid under the Supremacy Clause of the Constitution because it conflicts with the federal statute as applied by the Pay Board. See *Public Utilities Comm. of California* v. *United States*, 355 U.S. 534, 542–545; *Free* v. *Bland*, 369 U.S. 663, 666–668; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483–484; *United States* v. *Chandler*, 410 U.S. 257, 262.

CONCLUSION

The writ of certiorari should be dismissed or, alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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"§ 202. Findings

"It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

"§ 203. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

"(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title; and

"(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to

prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

"(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall—

"(1) be generally fair and equitable;

"(2) provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

"(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

"(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

"(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

"(c)(1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to

August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

"(d) Notwithstanding any other provisions of this title, this title shall be implemented in such a manner

that wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor.

"(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement of reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly economic growth.

"(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

"(1) required under the Fair Labor Standards Act of 1938, as amended, or effected as a result of enforcement action under such Act; or

"(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act; or

"(3) paid in conjunction with existing or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

"(g) For the purposes of this section the terms 'wages' and 'salaries' do not include contributions by